135

No. (1) 09-137

Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID GOWAN,

Petitioner,

v.

WARD COUNTY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The North Dakota Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a property owner's request for rezoning to develop his own land can be denied based on the government's unsafe use of near-by property in which the government itself creates and asserts a danger by its own unsafe use of the near-by property as a place to fire various dangerous weapons, including pistols, rifles, high-powered sniper rifles, and chemical munitions.

   A. Whether a landowner's property rights to develop his land can be legally blocked based on a hazardous condition (gun range used by city and county police officers) created not by the landowner but the neighbor.

   B. Whether a county commission can legally refuse to change a zoning from agricultural to residential because of a nuisance the county itself has created.

   C. Whether a landowner who meets all the conditions of a rezoning can nonetheless be denied the rezoning because the governmental body is unwilling to expend funds to mitigate a hazard it has created.

2. Whether such a denial of a rezoning of near-by property is a taking under the Fifth Amendment.

3. Whether a state court can prevent U.S. Supreme Court jurisdiction by falsely stating in its opinion that the federal constitutional issue was not raised in the appeal below.

PARTIES TO THE PROCEEDING

The parties are David Gowan, Petitioner, and Ward County Commission, Respondent (as indicated in the caption).

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CITATION OF OFFICIAL REPORT OF OPINION

Gowan v. Ward County Commission, 2009 ND 72, 764 N.W.2d 425.

STATEMENT OF BASIS FOR JURISDICTION

The North Dakota Supreme Court rendered its decision in *Gowan v. Ward County Commission*, 2009 ND 72, 764 N.W.2d 425, on April 30, 2009. It sent the Judgment dated April 30, 2009 to counsel on May 4, 2009. The Judgment became final at the end of the time for submitting a petition for re-hearing, which under rule is 14 days after the decision was rendered. No petition for re-hearing was submitted. The Judgment therefore became final on May 14, 2009. The Supreme Court has jurisdiction to review state court decision under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS

The Fifth Amendment of the United States Constitution prohibits the taking of property without just compensation. The Fourteenth Amendment requires Equal Protection under the law.

STATEMENT OF THE CASE

The case of *Gowan v. Ward County Commission*, 2009 ND 72, 764 N.W.2d 425, deals with a landowner, David Gowan, and his attempt to rezone his property that is situated out-of-town from agricultural to residential for the purpose of building 12 houses on 73 acres. David Gowan raised the following issues before the North Dakota Supreme Court:

> Whether the decision of the Commission to deny Gowan use of his property based not on any unsafe conduct by Gowan or his proposed use of the property and instead based on the unsafe conduct and use of nearby property not owned or operated by Gowan is
>
> 1) unreasonable, arbitrary, and capricious as a matter of law an improper and unconstitutional taking under the United States Constitution and the North Dakota Constitution;
>
> 2) unreasonable, arbitrary, and capricious is an improper and unconstitutional taking as the law is applied to the facts of this case under the United States Constitution and the North Dakota Constitution; and
>
> 3) unreasonable, arbitrary, and capricious under North Dakota law.

The North Dakota Supreme Court described the facts surrounding the danger created by the police firing range as follows:

"In this case, the Commission prepared extensive and detailed findings explaining its rationale for denying Gowan's rezoning request:

> "There is a police firing range, pistol shooting range, and archery range in the area that Mr. Gowan seeks to have rezoned from agricultural to residential. The firing range is used almost every day for training purposes by law enforcement and the military. According to law enforcement representatives, if Mr. Gowan's zone change request was granted, the safety of future residents of Mr. Gowan's proposed development would be at risk due to the close proximity and location of the firing range. Extensive testimony was given by several law enforcement representatives indicating that the close proximity of the firing range to the proposed development would be dangerous. Steve Kukowski has been with the Ward County Law Enforcement center for 34 years and owns land in the area. He maintains the firing range. He stated that law enforcement sends officers every day to train on the firing range. This includes brand-new officers that have never handled firearms before. In such circumstances, Kukowski testified that accidents do happen.
>
> "The Ward County Commission was advised there was recently an incident in

which a stray bullet fired by a police officer at a police firing range strayed out of the range, and struck an apartment building where children were watching TV. This shot was fired by a handgun. The bullet traveled a distance of just under three quarters of a mile. The area where law enforcement shoot high powered rifles is only a quarter of a mile from the area that Mr. Gowan would like to place housing. Minot Police Department Chief Jeff Balentine stated that a police firing range and [sic] [E]lk [C]ity[,] Oklahoma[,] had to close after a military veteran was accidentally shot while standing outside a car dealership when a bullet ricocheted off a metal frame that holds targets at the gun range. It would be expensive to move the range. He stated there are kids in the area and he is concerned with safety. He stated that rifle gunfire can travel a long way from a ricochet. Law enforcement indicated this is a very dangerous situation due to the fact that high powered rifles, including sniper rifles, shoot even further than handguns, such as the handgun used in the earlier incident. The Ward County Commission finds, based upon the statements and correspondence of law enforcement, that the proximity and location of the police firing range, pistol shooting range, and archery range pose an unreasonable risk to the safety of future residents,

including children, in Mr. Gowan's proposed development.

"Further, according to law enforcement representatives, other law enforcement training facilities in the state, such as the facilities in Fargo and Bismarck, were forced to shut down as residential development encroached on their training facilities. If Mr. Gowan's zone change request was granted, the Minot police department might have to purchase new land and start over at a new range in a different location at the expense of taxpayers. A law enforcement officer testified that currently, Bismarck law enforcement officers travel many miles in order to do their training. Ward County would also be forced to purchase land further outside of residential areas and law enforcement would have to travel in order to train. He testified that the Minot Rifle [a]nd Pistol Club built a new facility for a cost of over $500,000. Therefore, it would be quite expensive for law enforcement to purchase land and move to a new range or build a new facility for law enforcement training purposes.

"Other firing ranges near residential areas have had difficulties because of noise complaints from residents. There is automatic rifle fire at the range near Mr. Gowan's property, which is different than an ordinary firing at a shooting

range. There is also shooting in all weather conditions and at night to train officers. The range is also used for chemical munitions and very loud distraction devices, which may affect residents in the area. The Ward County Commission finds, based upon the statements and correspondence of law enforcement, that the firing range would expose residents to nuisances such as loud noises and chemicals. If Mr. Gowan[']s requested zone change was granted, the Ward County Commission finds it likely that the firing range would eventually be forced to move to a different location, at the expense of taxpayers, because of public safety concerns and problems with residents caused by gun firing noise, chemical munitions, and loud distraction devices used by law enforcement for training on the firing range.

"Concerned citizens and adjoining land owners have voiced concerns for the safety of residents, including children, near the police firing range. Further, they have expressed concern that a residential development would hamper rural recreational activities and harm wildlife in the area. They have also expressed concern that the firing range would ultimately be closed. The Ward County Commission also finds that these statements support a denial of Mr. Gowan's request.

> "Further, Bea Shaw donated the land that the firing range sits on to be used exclusively as a law enforcement training center, according to her late husband's wishes. She indicated she opposed the zone change and stated to the County Commission that she wants the firing range to stay as it is. If the property ceases to be used as a firing range for law enforcement training purposes, it will revert back to the Shaw family. If the property reverts back to the Shaw family, Ward County would not receive proceeds from the sale of the land in the event that the firing range would need to be moved as a result of the close proximity to residential property. Ward County would not have the benefit of this money to move to a new location."

The Court then refused to "substitute" its judgment for the judgment of the county commission, declaring the following:

> "The Commission's decision demonstrates a rational mental process, which is all that is required to survive a challenge under our standard of review. We conclude the Commission's decision is supported by substantial evidence and is not arbitrary, capricious or unreasonable."

Despite the fact that the issues presented clearly included raising both federal and state constitutional arguments (and the brief discussed those arguments),

the North Dakota Supreme Court nonetheless stated the following:

> "Gowan raised equal protection and due process arguments in the district court. However, Gowan abandoned those arguments by failing to raise them in his appellate brief to this Court. *See, e.g., City of Fargo v. Windmill, Inc.*, 350 N.W.2d 32, 35 (N.D. 1984). Gowan also claims the Commission's action has resulted in an unconstitutional taking of his property without just compensation. This is not an inverse condemnation action, but is an appeal from a decision of a local governing body under N.D.C.C. § 28-34-01."

Gowan did not abandon the federal issues. He raised the issues as part of the issues stated as well as in the text of his Appellant Brief and his Reply Brief. In his Appellant's Brief he stated the following:

> "**¶85** Gowan believes that the denial of the zoning change is as a matter of law an abuse of discretion. As stated above, the safety issue being raised relates *not* to Gowan's property, but to the adjacent property being used by law enforcement personnel. In Mr. Gowan's view, it is unreasonable, arbitrary, and capricious to use a safety issue *created by the actions of others and relating to the property of others* to be used to deny Mr. Gowan the option of developing his own property (which does *not* involve creating a safety concern and constitutes the lawful development of his property) as he sees fit. In Mr. Gowan's view, *if there is a safety issue*

relating to someone else's property, then it is up to the county to resolve that issue with the persons creating the safety issue and whose conduct actually creates the safety problem. To deny Mr. Gowan the right to develop his property or have it rezoned as he wishes *based on the conduct of others or the manner in which some other group is using the neighboring land violates his due process rights, his property rights, and his equal protection rights.* The refusal to allow a rezoning based on the actions of someone else on adjacent or non-adjacent neighboring property is in our view *as a matter of law* unreasonable, arbitrary, and capricious. It is also unreasonable, arbitrary, and capricious upon the application of the facts to the applicable law. The proposed development of Mr. Gowan's property is *not* creating a safety issue; any safety issue is directly caused by the actions of the owners and users of the adjacent property. The County not be allowed to refuse to allow the change in zoning just to create a buffer away from a danger created by someone else.

"¶86 The taking of property in this reaches a constitutional dimension. The value of the property has been substantially reduced by the failure of the property to be zoned from agricultural to residential. Gowan was going to place 12 homes on the property. The houses were to be valued between $300,000 to $500,000 homes. The value of the development would therefore be $3.6 million to $6 million. The Commission

itself discussed that the added value of the property would be at least $4 million dollars. By denying the change in zoning *because of the actions of other property owners and users*, Gowan has suffered a taking as defined under the Fifth Amendment of the United States Constitution (as applied through the Fourteenth Amendment) and under Article 1, Section 12 of the North Dakota Constitution. Nor is it appropriate for the adjacent landowner to use as a basis for the denying the supposed specter of an increase in taxes that would result from the adjacent property owner being required to make his or her own property safe to the surrounding community or for that matter the possibility that the gun range (which is admitted by the police themselves to be unsafe to the surrounding neighbors) may have to be moved, thereby resulting in an increase in taxes.

"¶87 Gowan believes that where a person is using his or her actual property in a way that is in compliant with health and safety concerns, it is a violation of both state and federal constitutional law – as a matter of law – to deny a zoning change *due to the unsafe conduct of some other property owner or user*. It is the person or entity that is creating a safety risk that must make its action safe to adjacent owners, not the adjacent or neighboring owner who is not creating such a risk. As long as the person who wants to develop his or her property by a change in zoning is not the one creating the

> risk, it is a violation of constitutional law and general state law to deny the zoning change. It is also unreasonable, arbitrary, and capricious to use someone else's risky behavior on adjacent and neighboring land as an basis for denying the lawful and safe use and development of some other person's own land."

Gowan's Appellant's Brief at ¶¶ 85-87.

In his Reply Brief Gowan stated the following:

> "**¶6** Fourth, the Commission properly states the law relating to equal protection, while failing to realize the proper application of that law to this case: 'the equal protection clause prohibits the government from treating individuals differently who are alike in all relevant aspects.' Commission Brief at ¶35. The decision to deny re-zoning in this case violate due process and equal protection law in a situation where the surrounding neighbors have previously been allowed to change the zoning to residential and build houses in closer proximity to the range and the danger. The Commission asserts that Detective Kukoski is a caretaker, despite no evidence of his being hired for that purpose. The exhibits submitted by the Commission demonstrate that Kukoski was allowed to purchase the land immediately adjacent to the range, change the zoning to residential, and do so without any reference to his being a caretaker or any restriction or limitation to his selling the house to any person. Kukoski,

as a fellow law enforcement agent, was part of their little club and so letting him develop the land was allowed.

"¶7 Fifth, it is not appropriate to deny re-zoning based on a fear of subsequent lawsuits against a neighbor for the acts of the neighbor, or for that matter the fear of increased taxes because the entities creating the hazard are public entities that – if required to make their actions safe or no longer a danger to the neighbors – may have to raise taxes due to the added expenses incurred to fix the hazard or danger those entities are themselves creating. The real crux of the Commission's decision is the repeated reference to 'the cost of constructing a new firing range would be very high' at ¶8 of the Commission's Brief, and that 'Ward County might be subject to future lawsuits' at ¶27. If the County needs to build a new facility or move to a different location due to the danger it and other law enforcement entities are themselves creating, so be it; they are creating the danger, not Gowan, and his option of developing his own land should not be based on the chance that the public entities may have to expend money to make their hazardous activities safe.

"¶8 Sixth, the Commission declares that Gowan's arguments are 'novel.' Commission Brief at ¶33. The rights of property and the rights of owners to develop their property are not novel. Such rights find basis in our founding documents, both in the

> United States Constitution and our North Dakota Constitution. They are fundamental rights. They are rights that are axiomatic. And a taking occurs not only be the taking of land, but also by its devaluation due to the actions of the government. The United States Supreme Court has specifically noted that devaluation or taking by zoning decisions of the government impinge on property rights protected by the federal constitution:
>
> > After the decision in *Pennsylvania Coal Co. v. Mahon, supra,* we confronted cases where specific and identified properties or property rights were alleged to come within the regulatory takings prohibition: . . . zoning on parcels of real property, *e.g., MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); . . .
>
> *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541, 118 S.Ct. 2131, 2155, 141 L.Ed.2d 451 (Kennedy, J., dissenting in part and concurring in part)."

Gowan's Reply Brief at ¶¶ 6-8. It is clear that the federal issues were raised below.

ARGUMENT

The issue of property rights is an important one. David Gowan understandably views the Commission's decision to be a taking of his property. The decision to deny him the right to develop his own land due to a safety hazard created by the government itself is unreasonable, arbitrary, and capricious. It is unreasonable that they are using the safety issue to disallow him to build when he has made it clear he is willing to put a buffer between the shooting area with farm land and therefore the homes at issue would be literally out of the line of fire. It is also unreasonable for the Commission to allow houses to be in closer proximity than the homes he intends to build, while denying him the right to build homes on his property. It is also unreasonable for the County Commission to deny him the ability to use his property as he sees fit, including developing it by building twelve residences in that area. It is also unreasonable for the County to consider safety as an issue when they allow people to drive on the road. If it is unsafe for the residents that would be living on Gowan's property, then it is also unsafe for the people driving by on county road that is situated between the firing range and Gowan's property. In Gowan's view, it is both unreasonable and arbitrary for the County Commissioner to allow others to build homes and be in homes closer to the range and not allow his building to continue.

In our view, it is the people using and operating the rifle range that have to make sure it is safe for any residents, any passersby driving on the adjacent

road, and anyone within the area. If the rifle range is causing a safety problem, then the users of that range – including the governmental entity that is denying the rezoning – should be the ones that have to resolve that problem and make the area safe. David Gowan should not be responsible for insuring that the rifle range is being run in a safe manner, and he certainly should not be denied the right to develop his property because of a safety issue created by the government itself by its unsafe use of the near-by property.

By the same token, any speculation as to having to move the rifle range to another location and any added tax consequences to the city of Minot and Ward County is unreasonable and inappropriate. If indeed the county or city Police Department has to move it because of safety reasons, David Gowan should not be denied his right to develop his property because of something the city will have to do if they are indeed running something that is unsafe.

The North Dakota Supreme Court has decided an important question of federal law that has not been, but should be settled by the United States Supreme Court, to wit, whether a property owner's request for rezoning to develop his own land can be denied based on the government's unsafe use of near-by property in which the government itself creates and asserts a danger by its own unsafe use of the near-by property.

Dated this 29th day of July, 2009.

Respectfully submitted,

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Attorney for the Petitioner

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT
Supreme Court No. 20080239

Appeal from the district court for Ward County.

David Gowan,	**Plaintiff and Appellant**
v.	
Ward County Commission,	**Defendant and Appellee**

This appeal having been heard by the Court at the February 2009 Term before:

Chief Justice Gerald W. VandeWalle, Justice Dale V. Sandstrom, Justice Mary Muehlen Maring, Justice Carol Ronning Kapsner, and Justice Daniel J. Crothers;

and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the district court judgment affirming the Ward County Commission's decision to deny Gowan's request to change the zoning of his land from agricultural to residential is AFFIRMED.

IT IS FURTHER ORDERED AND ADJUDGED that the Ward County Commission have and recover from David Gowan costs and disbursements on this appeal under Rule 39, N.D.R.App.P., to be taxed and allowed in the court below.

This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court.

Dated: April 30, 2009

By the Court:

/s/ Gerald W. VandeWalle
Chief Justice

ATTEST:

/s/ Penny Miller
Clerk

seal

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2009 ND 72

David Gowan, Plaintiff and Appellant

v.

Ward County Commission, Defendant and Appellee

No. 20080239

Appeal from the District Court of Ward County, Northwest Judicial District, the Honorable Gerald H. Rustad, Judge.

AFFIRMED.

Opinion of the Court by Crothers, Justice.

Lynn M. Boughey, Boughey Law Firm, Box 836, Bismarck, N.D. 58502-0836, for plaintiff and appellant.

Randall J. Bakke (argued) and David R. Phillips (on brief), Smith Bakke Porsborg & Schweigert, P.O. Box 460, Bismarck, N.D. 58502-0460, for defendant and appellee.

(Filed Apr. 30, 2009)

Crothers, Justice.

[¶1] David Gowan appeals from a judgment affirming the Ward County Commission's decision to deny his request to change the zoning of his land from agricultural to residential. Because the Ward County Commission's denial of Gowan's request is supported

by substantial evidence and is not arbitrary, capricious or unreasonable, we affirm.

I

[¶2] In 2005 Gowan purchased land west of Minot in Burlington Township that was zoned agricultural. The land is located about one-quarter mile downrange from a law enforcement firing range. A private shooting range and a private archery range are also located in the area. In 2007 Gowan received preliminary plat approval by the Ward County Planning Commission ("Planning Commission") for a 12-lot residential subdivision on the property. Gowan requested that the Planning Commission approve the proposed final plat and change the zoning of the property from agricultural to residential to allow construction of the development. After two hearings, the Planning Commission recommended Gowan's request be denied. The Planning Commission cited safety concerns, a fear of having to close the firing range, and a reluctance to have the development hamper rural activities in the area as the reasons for the denial.

[¶3] Gowan appealed the Planning Commission's denial of his rezoning request to the Ward County Commission ("Commission"). Gowan and other concerned citizens appeared on the request at two Commission meetings. On October 15, 2007, the Commission, on a three to two vote, approved the Planning Commission's recommendation and denied

Gowan's request to change the zoning of his property from agricultural to residential. The district court affirmed the Commission's decision.

II

[¶4] Gowan argues the Commission erred in denying his request to rezone his property from agricultural to residential.

[¶5] This Court's deferential standard of review for decisions of local governing bodies is well established:

> "When considering an appeal from the decision of a local governing body under N.D.C.C. § 28-34-01, our scope of review is the same as the district court's and is very limited. *Tibert v. City of Minto,* 2006 ND 189, ¶ 8, 720 N.W.2d 921 (citing *Pic v. City of Grafton,* 1998 ND 202, ¶¶ 6, 8, 586 N.W.2d 159). This Court's function is to independently determine the propriety of the [Commission's] decision without giving special deference to the district court decision. *Tibert,* at ¶ 8. The [Commission's] decision must be affirmed unless the local body acted arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision. *Id.* (citing *Graber v. Logan County Water Res. Bd.,* 1999 ND 168, ¶ 7, 598 N.W.2d 846). 'A decision is not arbitrary, capricious, or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose

> of achieving a reasoned and reasonable interpretation.' *Tibert,* at ¶ 8 (citing *Klindt v. Pembina County Water Res. Bd.,* 2005 ND 106, ¶ 12, 697 N.W.2d 339). 'We fully review the interpretation of an ordinance, and a governing body's failure to correctly interpret and apply controlling law constitutes arbitrary, capricious, and unreasonable conduct.' *City of Fargo v. Ness,* 551 N.W.2d 790, 792 (N.D.1996) (citing *Gullickson v. Stark County Comm'rs,* 474 N.W.2d 890, 892 (N.D.1991))."

Hentz v. Elma Twp. Bd. of Supervisors, 2007 ND 19, ¶ 4, 727 N.W.2d 276.

[¶6] In this case, the Commission prepared extensive and detailed findings explaining its rationale for denying Gowan's rezoning request:

> "There is a police firing range, pistol shooting range, and archery range in the area that Mr. Gowan seeks to have rezoned from agricultural to residential. The firing range is used almost every day for training purposes by law enforcement and the military. According to law enforcement representatives, if Mr. Gowan's zone change request was granted, the safety of future residents of Mr. Gowan's proposed development would be at risk due to the close proximity and location of the firing range. Extensive testimony was given by several law enforcement representatives indicating that the close proximity of the firing range to the proposed development would be dangerous. Steve Kukowski has been with the Ward County

Law Enforcement center for 34 years and owns land in the area. He maintains the firing range. He stated that law enforcement sends officers every day to train on the firing range. This includes brand-new officers that have never handled firearms before. In such circumstances, Kukowski testified that accidents do happen.

"The Ward County Commission was advised there was recently an incident in which a stray bullet fired by a police officer at a police firing range strayed out of the range, and struck an apartment building where children were watching TV. This shot was fired by a handgun. The bullet traveled a distance of just under three quarters of a mile. The area where law enforcement shoot high powered rifles is only a quarter of a mile from the area that Mr. Gowan would like to place housing. Minot Police Department Chief Jeff Balentine stated that a police firing range and [sic] [E]lk [C]ity[,] Oklahoma[,] had to close after a military veteran was accidentally shot while standing outside a car dealership when a bullet ricocheted off a metal frame that holds targets at the gun range. It would be expensive to move the range. He stated there are kids in the area and he is concerned with safety. He stated that rifle gunfire can travel a long way from a ricochet. Law enforcement indicated this is a very dangerous situation due to the fact that high powered rifles, including sniper rifles, shoot even further than handguns, such as the handgun used

in the earlier incident. The Ward County Commission finds, based upon the statements and correspondence of law enforcement, that the proximity and location of the police firing range, pistol shooting range, and archery range pose an unreasonable risk to the safety of future residents, including children, in Mr. Gowan's proposed development.

"Further, according to law enforcement representatives, other law enforcement training facilities in the state, such as the facilities in Fargo and Bismarck, were forced to shut down as residential development encroached on their training facilities. If Mr. Gowan's zone change request was granted, the Minot police department might have to purchase new land and start over at a new range in a different location at the expense of taxpayers. A law enforcement officer testified that currently, Bismarck law enforcement officers travel many miles in order to do their training. Ward County would also be forced to purchase land further outside of residential areas and law enforcement would have to travel in order to train. He testified that the Minot Rifle [a]nd Pistol Club built a new facility for a cost of over $500,000. Therefore, it would be quite expensive for law enforcement to purchase land and move to a new range or build a new facility for law enforcement training purposes.

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complaints from residents. There is automatic rifle fire at the range near Mr. Gowan's property, which is different than an ordinary firing at a shooting range. There is also shooting in all weather conditions and at night to train officers. The range is also used for chemical munitions and very loud distraction devices, which may affect residents in the area. The Ward County Commission finds, based upon the statements and correspondence of law enforcement, that the firing range would expose residents to nuisances such as loud noises and chemicals. If Mr. Gowan[']s requested zone change was granted, the Ward County Commission finds it likely that the firing range would eventually be forced to move to a different location, at the expense of taxpayers, because of public safety concerns and problems with residents caused by gun firing noise, chemical munitions, and loud distraction devices used by law enforcement for training on the firing range.

"Concerned citizens and adjoining land owners have voiced concerns for the safety of residents, including children, near the police firing range. Further, they have expressed concern that a residential development would hamper rural recreational activities and harm wildlife in the area. They have also expressed concern that the firing range would ultimately be closed. The Ward County Commission also finds that these statements support a denial of Mr. Gowan's request.

> "Further, Bea Shaw donated the land that the firing range sits on to be used exclusively as a law enforcement training center, according to her late husband's wishes. She indicated she opposed the zone change and stated to the County Commission that she wants the firing range to stay as it is. If the property ceases to be used as a firing range for law enforcement training purposes, it will revert back to the Shaw family. If the property reverts back to the Shaw family, Ward County would not receive proceeds from the sale of the land in the event that the firing range would need to be moved as a result of the close proximity to residential property. Ward County would not have the benefit of this money to move to a new location."

[¶7] Gowan raises numerous arguments in support of his contention that the Commission's decision is arbitrary, capricious, and unreasonable. Gowan claims the decision is unreasonable because others have been allowed to build residences in the area; because he offered to create a buffer with farmland between the shooting area and the residential development and use covenants so purchasers would know of the existence of the firing range; because the cost of moving the law enforcement firing range to another location would be offset by the taxes paid by the development's residents; because if the area is unsafe for potential development residents, it is also unsafe for travelers on a county road running through the area and it is the responsibility of the entities

operating the firing ranges to insure the safety of the people in the area; and because any safety issues are created by people other than himself.

[¶8] However, there are countervailing arguments the Commission could have considered. One of the two people who lives in the area maintains the firing range, and neither of them live downrange from the firing range. The buffer would not alleviate concerns about hampered recreational activities and harm to wildlife or alleviate the noise caused by the firing range. *See Lindteigen v. City of Bismarck,* 1997 ND 123, ¶ 8, 565 N.W.2d 47 (landowner was not entitled to rezone land from residential to agricultural to build a private airport where there was danger to the public and the potential for excessive noise). The Commission discussed the potential tax benefits but did not believe they would be sufficient to outweigh the negative aspects of the development. Although Gowan argues that there is a road in the area and travelers are equally in danger, the Commission was not obligated to place more people in danger by granting his rezoning request.

[¶9] Moreover, even if Gowan's complaints are meritorious, the Commission's concerns are meritorious as well. This Court "does not substitute its judgment for that of the local governing body which initially made the decision." *Hector v. City of Fargo,* 2009 ND 14, ¶ 9, 760 N.W.2d 108. The Commission's decision demonstrates a rational mental process, which is all that is required to survive a challenge under our standard of review. We conclude the Commission's

decision is supported by substantial evidence and is not arbitrary, capricious or unreasonable.

III

[¶10] Gowan objects to the Commission's written findings because they were issued, at his behest, after he filed the notice of appeal to district court. Section 11-33-01, N.D.C.C., provides the "board of county commissioners and a county zoning commission shall state the grounds upon which any request for a zoning amendment or variance is approved or disapproved, and written findings upon which the decision is based must be included within the records of the board or commission." Under N.D.C.C. § 28-34-01(2), the "court may permit amendments or additions to the record to complete the record." Gowan requested that the record be completed, and his request was satisfied. The written findings merely summarize the testimony at the Commission meetings. Gowan's argument is without merit.

[¶11] Gowan raised equal protection and due process arguments in the district court. However, Gowan abandoned those arguments by failing to raise them in his appellate brief to this Court. *See, e.g., City of Fargo v. Windmill, Inc.*, 350 N.W.2d 32, 35 (N.D. 1984). Gowan also claims the Commission's action has resulted in an unconstitutional taking of his property without just compensation. This is not an inverse condemnation action, but is an appeal from a decision of a local governing body under N.D.C.C.

§ 28-34-01. As in *City of Fargo v. Malme*, 2008 ND 172, ¶ 6, 756 N.W.2d 197, in which the appellant could not "turn an administrative appeal into a federal civil rights action," Gowan cannot turn this appeal into an inverse condemnation action. We therefore do not address this issue.

IV

[¶12] The judgment is affirmed.

[¶13] Daniel J. Crothers
Mary Muehlen Maring
Carol Ronning Kapsner
Dale V. Sandstrom
Gerald W. VandeWalle, C.J.

STATE OF NORTH DAKOTA COUNTY OF WARD	IN DISTRICT COURT NORTHWEST JUDICIAL DISTRICT
David Gowan, Plaintiff, vs. Ward County Commission, Defendant.	Civil No. 51-07-C-01859 **JUDGMENT** (Filed Jul. 22, 2008)

*** *** ***

Pursuant to the Court's Order Refusing Plaintiff's Requested Zoning Change, dated June 25, 2008, in the above-captioned matter:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that all claims by plaintiff, against defendant Ward County Commission, are hereby dismissed with prejudice.

Dated this 22nd day of July, 2008.

BY THE COURT:

/s/ Susan Hoffer
Clerk of Ward County
District Court

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF WARD	NORTHWEST JUDICIAL DISTRICT
David Gowan, Appellant, vs. Ward County Commission, Appellee.	**ORDER** Civil No. 07-C-1859

The Appellant, David Gowan, appeals to the District Court from a decision of the Ward County commission refusing a requested zoning change to his land in rural Ward County. The request was from agricultural to residential.

A series of hearings were held before the Planning Commission and before the County Commission at which relevant testimony, information, and exhibits were presented.

After consideration of the substantial record, the County Commission denied the Gowan application.

An appeal to this Court presented the entire record, and included oral arguments by the parties, as well as significant briefs outlining the facts and opinions considered, plus legal standards for the Court's consideration.

As suggested by the brief of the County, a deferential standard applies to the determinations made by the County Commission.

It appears that the Commission had justifiable concerns regarding safety, noise, costs, and other issues enumerated based upon the evidence presented.

I find no basis for a claim that the Commission acted arbitrarily, capriciously, or unreasonably in reaching their decision.

Likewise, the Court finds no basis for attacking the Commission decision on grounds of equal protection violation, due process violation, or other constitutional grounds.

The reasoning and factual presentations set forth in the County's 31-page brief are found by this Court to be persuasive and are adopted by the Court.

The Court affirms the decision of the Ward County Commission.

Dated at Williston, North Dakota, this 25th day of June, 2008.

BY THE COURT:

/s/ Gerald Rustad
GERALD RUSTAD
District Judge

[CERTIFICATE OF SERVICE
OMITTED IN PRINTING]

MOTION

ADOPTED: February 5, 2008

BY: Ward County Board of Commissioners

With Van Grinsven appearing for comment, it was moved by Comm. Watne, seconded by Comm. Gruenberg to approve the findings in the Gowan zone change denial. Roll call: all voted yes, except Comm. Lee; motion carried.

ATTEST:

/s/ Devra Smestad
Ward County Auditor

Copies: Randall Bakke

The following are the written findings of the Ward County Commission in support of its decision to uphold the Ward County Planning Commission's recommendation to deny David Gowan's plat application and zone change for Elk Park Addition Section 24 Burlington Township (155-84) in Ward County.

Several law enforcement representatives, as well as several concerned citizens and adjoining land owners, have made statements to the planning commission and Board of Ward County Commissioners requesting that Mr. Gowan's request for a zone change be denied. These statements were made at meetings held on the issue of Mr. Gowan's zone change request. Further, concerned citizens Peter Yung and Percy Ottmar provided a letter dated September 9, 2007, Shelia Johnson provided a letter, and Captain Steve

Kukowski at the Minot Police Department provided a letter dated September 28, 2007, all requesting that Mr. Gowan's request for a zone change be denied.

There is a police firing range, pistol shooting range, and archery range in the area that Mr. Gowan seeks to have rezoned from agricultural to residential. The firing range is used almost every day for training purposes by law enforcement and the military. According to law enforcement representatives, if Mr. Gowan's zone change request was granted, the safety of future residents of Mr. Gowan's proposed development would be at risk due to the close proximity and location of the firing range. Extensive testimony was given by several law enforcement representatives indicating that the close proximity of the firing range to the proposed development would be dangerous. Steve Kukowski has been with the Ward County law Enforcement Center for 34 years and owns land in the area. He maintains the firing range. He stated that law enforcement sends officers every day to train on the firing range. This includes brand-new officers that have never handled firearms before. In such circumstances, Kukowski testified that accidents do happen.

The Ward County Commission was advised there was recently an incident in which a stray bullet fired by a police officer at a police firing range strayed out of the range, and struck an apartment building where children were watching TV. This shot was fired by a handgun. The bullet traveled a distance of just under three quarters of a mile. The area where law

enforcement shoot high powered rifles is only a quarter of a mile from the area that Mr. Gowan would like to place housing. Minot Police Department Chief Jeff Balentine stated that a police firing range and [sic] elk city [sic] Oklahoma had to close after a military veteran was accidentally shot while standing outside a car dealership when a bullet ricocheted off a metal frame that holds targets at the gun range. It would be expensive to move the range. He stated there are kids in the area and he is concerned with safety. He stated that rifle gunfire can travel a long way from a ricochet. Law enforcement indicated this is a very dangerous situation due to the fact that high powered rifles, including sniper rifles, shoot even farther than handguns, such as the handgun used in the earlier incident. The Ward County Commission finds, based upon the statements and correspondence of law enforcement, that the proximity and location of the police firing range, pistol shooting range, and archery range pose an unreasonable risk to the safety of future residents, including children, in Mr. Gowan's proposed development.

Further, according to law enforcement representatives, other law enforcement training facilities in the state, such as the facilities in Fargo and Bismarck, were forced to shut down as residential development encroached on their training facilities. If Mr. Gowan's zone change request was granted, the Minot police department might have to purchase new land and start over at a new range in a different

location at the expense of taxpayers. A law enforcement officer testified that currently, Bismarck law enforcement officers travel many miles in order to do their training. Ward County would also be forced to purchase land farther outside of residential areas and law enforcement would have to travel in order to train. He testified that the Minot Rifle And Pistol Club built a new facility for a cost of over $500,000. Therefore, it would be quite expensive for law enforcement to purchase land and move to a new range or build a new facility for law enforcement training purposes.

Other firing ranges near residential areas have had difficulties because of noise complaints from residents. There is automatic rifle fire at the range near Mr. Gowan's property, which is different than an ordinary firing at a shooting range. There is also shooting in all weather conditions and at night to train officers. The range is also used for chemical munitions and very loud distraction devices, which may affect residents in the area. The Ward County Commission finds, based upon the statements and correspondence of law enforcement, that the firing range would expose residents to nuisances such as loud noises and chemicals. If Mr. Gowans' requested zone change was granted, the Ward County Commission finds it likely that the firing range would eventually be forced to move to a different location, at the expense of taxpayers, because of public safety concerns and problems with residents caused by gun firing noise, chemical munitions, and loud distraction

devices used by law enforcement for training on the firing range.

Concerned citizens and adjoining land owners have voiced concerns for the safety of residents, including children, near the police firing range. Further, they have expressed concern that a residential development would hamper rural recreational activities and harm wildlife in the area. They have also expressed concern that the firing range would ultimately be closed. The Ward County Commission also finds that these statements support a denial of Mr. Gowan's request.

Further, Bea Shaw donated the land that the firing range sits on to be used exclusively as a law enforcement training center, according to her late husband's wishes. She indicated she opposed the zone change and stated to the County Commission that she wants the firing range to stay as it is. If the property ceases to be used as a firing range for law enforcement training purposes, it will revert back to the Shaw family. If the property reverts back to the Shaw family, Ward County would not receive proceeds from the sale of the land in the event that the firing range would need to be moved as a result of the close proximity to residential property. Ward County would not have the benefit of this money to move to a new location.

For these reasons, the Ward County Commission denied David Gowan's plat application and zone

change for Elk Park Addition Section 24 Burlington Township (155-84) in Ward County.

Accepted & Approved
Feb. 5, 2008

/s/ Carroll W. Erickson
CHAIRMAN, BOARD CO.
COMMISSIONER WARD
COUNTY, ND

138

(2)

No. 09-137

Supreme Court, U.S.
FILED
AUG 2 6 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID GOWAN,

Petitioner,

v.

WARD COUNTY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. Material Facts And Procedural History

The facts in this case, as described by the North Dakota Supreme Court in the Opinion of the Court (*Gowan v. Ward County Commission*, 2009 ND 72, 764 N.W.2d 425; App. at pp. 3-13), have never been in dispute. The case involves a decision of the Ward County Commission, respondent in the above-captioned appeal, to deny a request by petitioner David Gowan (hereinafter "Gowan") to rezone his property from agricultural to residential to construct a 12 lot residential subdivision in Ward County, North Dakota. *Id.* at ¶¶ 2-3. Gowan's property is located approximately one-quarter mile downrange from a law enforcement firing range. *Id.* at ¶ 2. A private shooting range and a private archery range are also located near Gowan's property. *Id.*

After two public meetings, the Ward County Planning Commission recommended to the Ward County Commission that Gowan's request be denied. *Id.* "The Planning Commission cited safety concerns, a fear of having to close the [law enforcement] firing range, and a reluctance to have the development hamper rural activities in the area as the reasons for the denial." *Id.* The Ward County Commission then held three public meetings regarding Gowan's zoning change request. *Id.* at ¶ 3. Numerous individuals testified in opposition to the request, including law enforcement officers, adjoining property owners, and concerned citizens. *Id.* at ¶¶ 3, 6. "On October 15,

2007, the Ward County Commission, on a three to two vote, approved the Planning Commission's recommendation and denied Gowan's request to change the zoning of his property from agricultural to residential." *Id.* at ¶ 3. The Ward County Commission prepared detailed findings explaining the rationale for the denial of Gowan's request to rezone his property. *Id.* at ¶ 6. The findings of the Ward County Commission are quoted in their entirety in the opinion of the North Dakota Supreme Court and are as follows:

> There is a police firing range, pistol shooting range, and archery range in the area that Mr. Gowan seeks to have rezoned from agricultural to residential. The firing range is used almost every day for training purposes by law enforcement and the military. According to law enforcement representatives, if Mr. Gowan's zone change request was granted, the safety of future residents of Mr. Gowan's proposed development would be at risk due to the close proximity and location of the firing range. Extensive testimony was given by several law enforcement representatives indicating that the close proximity of the firing range to the proposed development would be dangerous. Steve Kukowski has been with the Ward County Law Enforcement center for 34 years and owns land in the area. He maintains the firing range. He stated that law enforcement sends officers every day to train on the firing range. This includes brand-new officers that

have never handled firearms before. In such circumstances, Kukowski testified that accidents do happen.

The Ward County Commission was advised there was recently an incident in which a stray bullet fired by a police officer at a police firing range strayed out of the range, and struck an apartment building where children were watching TV. This shot was fired by a handgun. The bullet traveled a distance of just under three quarters of a mile. The area where law enforcement shoot high powered rifles is only a quarter of a mile from the area that Mr. Gowan would like to place housing. Minot Police Department Chief Jeff Balentine stated that a police firing range and [sic] [E]lk [C]ity[,] Oklahoma[,] had to close after a military veteran was accidentally shot while standing outside a car dealership when a bullet ricocheted off a metal frame that holds targets at the gun range. It would be expensive to move the range. He stated there are kids in the area and he is concerned with safety. He stated that rifle gunfire can travel a long way from a ricochet. Law enforcement indicated this is a very dangerous situation due to the fact that high powered rifles, including sniper rifles, shoot even further than handguns, such as the handgun used in the earlier incident. The Ward County Commission finds, based upon the statements and correspondence of law enforcement, that the proximity and location of the police firing range, pistol shooting range, and archery

range pose an unreasonable risk to the safety of future residents, including children, in Mr. Gowan's proposed development.

Further, according to law enforcement representatives, other law enforcement training facilities in the state, such as the facilities in Fargo and Bismarck, were forced to shut down as residential development encroached on their training facilities. If Mr. Gowan's zone change request was granted, the Minot police department might have to purchase new land and start over at a new range in a different location at the expense of taxpayers. A law enforcement officer testified that currently, Bismarck law enforcement officers travel many miles in order to do their training. Ward County would also be forced to purchase land further outside of residential areas and law enforcement would have to travel in order to train. He testified that the Minot Rifle [a]nd Pistol Club built a new facility for a cost of over $500,000. Therefore, it would be quite expensive for law enforcement to purchase land and move to a new range or build a new facility for law enforcement training purposes.

Other firing ranges near residential areas have had difficulties because of noise complaints from residents. There is automatic rifle fire at the range near Mr. Gowan's property, which is different than an ordinary firing at a shooting range. There is also shooting in all weather conditions and at night to train officers. The range is also used

for chemical munitions and very loud distraction devices, which may affect residents in the area. The Ward County Commission finds, based upon the statements and correspondence of law enforcement, that the firing range would expose residents to nuisances such as loud noises and chemicals. If Mr. Gowan[']s requested zone change was granted, the Ward County Commission finds it likely that the firing range would eventually be forced to move to a different location, at the expense of taxpayers, because of public safety concerns and problems with residents caused by gun firing noise, chemical munitions, and loud distraction devices used by law enforcement for training on the firing range.

Concerned citizens and adjoining land owners have voiced concerns for the safety of residents, including children, near the police firing range. Further, they have expressed concern that a residential development would hamper rural recreational activities and harm wildlife in the area. They have also expressed concern that the firing range would ultimately be closed. The Ward County Commission also finds that these statements support a denial of Mr. Gowan's request.

Further, Bea Shaw donated the land that the firing range sits on to be used exclusively as a law enforcement training center, according to her late husband's wishes. She indicated she opposed the zone change and stated to

> the County Commission that she wants the firing range to stay as it is. If the property ceases to be used as a firing range for law enforcement training purposes, it will revert back to the Shaw family. If the property reverts back to the Shaw family, Ward County would not receive proceeds from the sale of the land in the event that the firing range would need to be moved as a result of the close proximity to residential property. Ward County would not have the benefit of this money to move to a new location.

Id. at ¶ 6.

Gowan appealed the decision of the Ward County Commission denying his rezoning request to the North Dakota District Court, Northwest Judicial District, pursuant to North Dakota Century Code section 28-34-01, which states:

> **28-34-01. Appeals from local governing bodies – Procedures.** This section, to the extent that it is not inconsistent with procedural rules adopted by the North Dakota supreme court, governs any appeal provided by statute from the decision of a local governing body, except those court reviews provided under sections 2-04-11 and 40-51.2-15. For the purposes of this section, "local governing body" includes any officer, board, commission, resource or conservation district, or other political subdivision. Each appeal is governed by the following procedure:

1. The notice of appeal must be filed with the clerk of the court within thirty days after the decision of the local governing body. A copy of the notice of appeal must be served on the local governing body in the manner provided by rule 4 of the North Dakota Rules of Civil Procedure.

2. The appellee shall prepare and file a single copy of the record on appeal with the court. Within thirty days, or such longer time as the court by order may direct, after the notice of appeal has been filed in the court, and after the deposit by the appellant of the estimated cost of a transcript of the evidence, the local governing body shall prepare and file in the office of the clerk of the court in which the appeal is pending the original or a certified copy of the entire proceedings before the local governing body, or such abstract of the record as may be agreed upon and stipulated by the parties, including the pleadings, notices, transcripts of all testimony taken, exhibits, reports or memoranda, exceptions or objections, briefs, findings of fact, proposed findings of fact submitted to the local governing body, and the decision of the local governing body in the proceedings. If the notice of appeal specifies that no exception or objection is made to the local governing body's findings of fact, and that the appeal is concerned only with the local governing

> body's conclusions based on the facts found by it, the evidence submitted at the hearing before the local governing body must be omitted from the record filed in the court. The court may permit amendments or additions to the record to complete the record.
>
> 3. If the court determines on its own motion or if an application for leave to adduce additional evidence is made to the court in which an appeal from a determination from a local governing body is pending, and it is shown to the satisfaction of the court that such additional evidence is material and that there are reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the local governing body, or that such evidence is material to the issues involved and was rejected or excluded by the local governing body, the court may order that such additional evidence be taken, heard, and considered by the local governing body on such terms and conditions as the court may determine. After considering the additional evidence, the local governing body may amend or modify its decision and shall file with the court a transcript of the additional evidence together with its new or modified decision, if any.

Id. (emphasis in original).

Gowan's appeal to the North Dakota district court was not an inverse condemnation action, but rather was an appeal of the decision of the Ward County Commission, with the state district court acting as an appellate court, pursuant to the procedures established in North Dakota Century Code section 28-34-01, quoted above.

As indicated in the Order of the district court (App. at pp. 15-16) and the briefs to the district court, which are in the record but not included in Gowan's Appendix to the Petition for Writ of Certiorari, Gowan made the following arguments to the district court: 1) the decision of the Ward County Commission was arbitrary, capricious, or unreasonable, 2) the Ward County Commission violated Gowan's due process rights, 3) the Ward County Commission violated Gowan's equal protection rights, and 4) the denial of Gowan's zoning change request constituted a taking of Gowan's property without just compensation. The district court rejected all of Gowan's arguments and upheld the decision of the Ward County Commission. App. at pp. 15-16.

Gowan then appealed the decision of the North Dakota district court to the North Dakota Supreme Court. A central argument of Gowan at the North Dakota Supreme Court, and the only substantive argument Gowan makes in his Petition for Writ of Certiorari is that allegedly a zoning commission must as a matter of constitutional law grant a request for rezoning even though there is a preexisting allegedly dangerous activity (in this case city, state, and federal

law enforcement training, as well as military training) conducted by a neighbor because the allegedly dangerous activity is created by the neighbor, not the individual seeking rezoning. This is in fact a novel theory of constitutional law, for which Gowan has never at any level of this case cited any state or federal legal authority. The North Dakota Supreme Court upheld the decision of the Ward County Commission to deny the rezoning request and the judgment of the district court.

II. Response To Gowan's Questions Presented For Review

In support of his contention that the United States Supreme Court has jurisdiction in this case, Gowan cites only 28 U.S.C. § 1257, which states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, **or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States**.

> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Petition for Writ of Certiorari at p. 1 (citing 28 U.S.C. § 1257) (emphasis added).

Thus, the only claims Gowan seeks to pursue at the United States Supreme Court, and the only claims even arguably within the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257, are his claims of violation of the clauses regarding taking without just compensation, due process, and equal protection under the United States Constitution pursuant to the Fourteenth Amendment and the Fifth Amendment as applied to the states through the Fourteenth Amendment.

Gowan's Questions Presented for Review section of his Petition for Writ of Certiorari does not clearly identify these three claims, only specifically mentioning taking without just compensation, which is explicitly claimed in the Questions Presented for Review. Petition for Writ of Certiorari at p. I, ¶ 2. However, Gowan does discuss his due process and equal protection claims in his brief. As discussed below in this brief, the North Dakota Supreme Court declined to consider Gowan's due process and equal protection claims because the North Dakota Supreme Court concluded those claims were waived. Apparently, Gowan does not seek, nor would he be entitled to seek an order from this Court that his due process and equal protection claims are meritorious, issues not

considered by the North Dakota Supreme Court because the issues were deemed waived. Rather he simply seeks an order that the claims were not waived in the North Dakota Supreme Court. It is apparent with regard to due process and equal protection, Gowan only seeks an order from this Court that "a state court can[not] prevent U.S. Supreme Court jurisdiction by falsely stating in its opinion that the federal constitutional issue was not raised in the appeal below." *Id.* at p. I, ¶ 3. It is clear however at this stage that Gowan's due process and equal protection claims were in fact waived and thus there is no jurisdiction for the United States Supreme Court to consider these issues.

Gowan's remaining question presented for review (*id.* at p. I, ¶ 1) is lengthy, including three subparts, and is highly argumentative in violation of Supreme Court Rule 14(1)(a). More importantly however, the question does not identify any applicable United States Constitution provision or amendment and does not identify any federal question for which this Court has jurisdiction. Thus, the issue must be disregarded by this Court as not presenting an issue which this Court has jurisdiction to consider under 28 U.S.C. § 1257, quoted above.

III. Gowan Has Waived His Fourteenth Amendment Claims Of Due Process And Equal Protection Because He Did Not Properly Present The Issues To The North Dakota Supreme Court

Gowan seeks in his Petition for Writ of Certiorari to pursue arguments regarding alleged violations of the Fourteenth Amendment to the United States Constitution guarantees of due process and equal protection. The Fourteenth Amendment to the United States Constitution states in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

With regard to Gowan's claims grounded in due process and equal protection, the North Dakota Supreme Court ruled:

> Gowan raised equal protection and due process arguments in the district court. However, Gowan abandoned those arguments by failing to raise them in his appellate brief to this Court. See, e.g., *City of*

> *Fargo v. Windmill, Inc.*, 350 N.W.2d 32, 35 (N.D. 1984).

Gowan, 2009 ND 72 at ¶ 11; App. at pp. 12-13.

As acknowledged in Gowan's Petition for Writ of Certiorari (at p. 2), he presented the following issues to the North Dakota Supreme Court in Appellant's Statement of the Issues, which notably make no reference whatsoever to equal protection or due process, only the taking without just compensation clauses of the United States and North Dakota constitutions:

> Whether the decision of the Commission to deny Gowan use of his property based not on any unsafe conduct by Gowan or his proposed use of the property and instead based on the unsafe conduct and use of nearby property not owned or operated by Gowan is
>
> 1) unreasonable, arbitrary, and capricious as a matter of law an improper and unconstitutional taking under the United States Constitution and the North Dakota Constitution;
>
> 2) unreasonable, arbitrary, and capricious is an improper and unconstitutional taking as the law is applied to the facts of this case under the United States Constitution and the North Dakota Constitution; and
>
> 3) unreasonable, arbitrary, and capricious under North Dakota law.

Further, as is evident from the lengthy quote in the Petition for Writ of Certiorari of Gowan's initial Appellant's Brief to the North Dakota Supreme Court, Gowan only mentioned due process and equal protection once in passing in his initial brief to the North Dakota Supreme Court. In that regard, he stated in the Appellant's Brief to the North Dakota Supreme Court, "[t]o deny Mr. Gowan the right to develop his property or have it rezoned as he wishes *based on the conduct of others or the manner in which some other group is using the neighboring land violates his due process rights, his property rights, and his equal protection rights.*" App. at p. 9, quoting ¶ 85 of Gowan's Appellant's Brief to the North Dakota Supreme Court (emphasis in original). In his Appellant's Brief to the North Dakota Supreme Court, Gowan did not quote the applicable due process and equal protection clauses of the United States or North Dakota constitutions and provided no legal authority or further explanation in support of his alleged due process and equal protection claims. In his reply brief to the North Dakota Supreme Court, Gowan again mentioned equal protection and due process merely in passing, with very limited discussion and without citation to any legal authority. App. at p. 11, quoting ¶ 6 of Gowan's reply brief to the North Dakota Supreme Court. The North Dakota Supreme Court has indicated in numerous cases the courts are not ferrets, required to search the record for evidence in support of a litigant's position or to scour a brief for issues that are not clearly explained to the court. *See e.g. Buchholz v. Barnes County Water Bd.*, 2008 ND

158, ¶ 16, 755 N.W.2d 472 (citing *Koapke v. Herfendal*, 2003 ND 64, ¶ 11, 660 N.W.2d 206).

Under prudential and jurisdictional principles, this Court has consistently held in numerous cases that the United States Supreme Court generally will not consider constitutional questions not raised in the state court, and when the highest state court is silent on a federal question, the petitioner has the burden to overcome a presumption that issue was not properly presented to the state court. *See e.g. Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889 (1981); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450 (1979); *Tacon v. Arizona*, 410 U.S. 351, 93 S. Ct. 998 (1973); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711 (1993); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 112 S. Ct. 1522 (1992); *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 123 S. Ct. 518 (2002); *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028 (1997); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 106 S. Ct. 2305 (1986); *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969). Gowan has not overcome the presumption that the due process and equal protection claims were waived at the North Dakota Supreme Court and thus this Court should deny certiorari with regard to those issues.

If this Court does grant the Petition for Writ of Certiorari, which it should not, the issue presented to the Court is limited to whether the claims of due process and equal protection were waived at the

North Dakota Supreme Court, not the merits of the claims, which were not addressed by the North Dakota Supreme Court.

IV. Gowan's Taking Without Just Compensation Claim Under The Fifth And Fourteenth Amendments Is Not Ripe For Review Because He Has Not Sought Compensation Through The Procedures The State Has Provided For Doing So

The Fifth Amendment to the United States Constitution, which is applied to the states under the Fourteenth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; **nor shall private property be taken for public use, without just compensation.**

Id. (emphasis added).

With regard to Gowan's claim of taking without just compensation pursuant to the Fifth Amendment

to the United States Constitution, the North Dakota Supreme Court ruled:

> Gowan also claims the Commission's action has resulted in an unconstitutional taking of his property without just compensation. This is not an inverse condemnation action, but is an appeal from a decision of a local governing body under N.D.C.C. § 28-34-01. As in *City of Fargo v. Malme*, 2008 ND 172, ¶ 6, 756 N.W.2d 197, in which the appellant could not "turn an administrative appeal into a federal civil rights action," Gowan cannot turn this appeal into an inverse condemnation action. We therefore do not address this issue.

Gowan, 2009 ND 72 at ¶ 11; App. at pp. 12-13.

Gowan's Petition for Writ of Certiorari comes to this Court as a result of an appeal of a decision of a local governing body in North Dakota state courts, pursuant to North Dakota Century Code section 28-34-01, quoted above. This is not an inverse condemnation action. In other words, Gowan did not seek just compensation pursuant to the state or federal constitution in an inverse condemnation action for the alleged taking, but rather sought only to overturn the decision of the Ward County Commission to deny Gowan's rezoning request, without ever requesting a monetary award. Gowan's takings claim under the Fifth Amendment is not ripe for review by this Court unless or until Gowan pursues an inverse condemnation action. In fact, Gowan has previously

admitted in his Appellant's Brief to the North Dakota Supreme Court that he has not sought to pursue his takings claim by an inverse condemnation action. Appellant's Brief to the North Dakota Supreme Court is not included in the Appendix but it is cited in this brief pursuant to Supreme Court Rule 12(7), which permits citation to a document in the record even if the document has not been transmitted to the Court. Gowan specifically admitted the issue of taking is not properly before the Court in this action, stating in Appellant's Brief to the North Dakota Supreme Court, "if the zoning and plat issue is not reversed, then clearly the decision of the County Commissioners creates a taking and inverse condemnation of the value of David Gowan's property and additional lawsuits will have to be brought in regards to those issues at a later time. . . ." *Id.* at p. 31.

In the United States Supreme Court case *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985), this Court held in no uncertain terms a plaintiff claiming violation of the takings clause of the Fifth Amendment must pursue an inverse condemnation action, which Gowan has failed to do. In that regard, this Court stated:

> The Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, the taking. If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just

> Compensation Clause until it has used the procedure and been denied just compensation. Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

Id. at 173.

The North Dakota Constitution provides a procedure for seeking compensation for an alleged taking, specifically an inverse condemnation action pursuant to article I, section 16 of the North Dakota Constitution. In that regard, the North Dakota Supreme Court has recently explained:

> Under N.D. Const. art. I, § 16, "[p]rivate property shall not be taken or damaged for public use without just compensation having been first made to . . . the owner." This Court has recognized the constitution "'secures to owners, not only the possession of property, but also those rights which render possession valuable.'" *Donaldson v. City of Bismarck*, 71 N.D. 592, 599-600, 3 N.W.2d 808, 812 (1942) (quoting *Pennsylvania R. Co. v. Angel*, 41 N.J. Eq. 316, 7 A. 432, 433 (Err. & App.1986)). "Inverse condemnation actions are a property owner's remedy, exercised when a public entity has taken or damaged the owner's property for a public use without

> the public entity's having brought an eminent domain proceeding." *Knutson v. City of Fargo*, 2006 ND 97, ¶ 9, 714 N.W.2d 44. Under N.D. Const. art. I, § 16, an inverse condemnation claim does not hinge on negligence or intent to harm, but "requires a public entity's taking or damaging an owner's property by some deliberate act, whether done intentionally, negligently, or innocently." *Knutson*, at ¶ 13. This Court has held the constitutional guarantee for inverse condemnation constitutes an implied contract to compensate for damages caused by a public entity. *Northern Pac. Ry. Co.*, 131 N.W.2d at 563; *Little v. Burleigh County*, 82 N.W.2d 603, 607 (N.D. 1957). To establish an inverse condemnation claim, a property owner must prove a public entity took or damaged the owner's property for a public use and the public use was the proximate cause of the taking or damages. *Knutson*, at ¶ 9; *Frank v. County of Mercer*, 186 N.W.2d 439, 445-46 (N.D. 1971); *Northern Pac. Ry. Co.*, 131 N.W.2d at 566-68.

Aasmundstad v. State, 2008 ND 206, ¶ 15, 763 N.W.2d 748.

Thus, the State of North Dakota has provided a remedy for Gowan to seek just compensation for the alleged taking, namely an inverse condemnation action, which Gowan has failed to pursue. Under clear United States Supreme Court case law, discussed above, Gowan was required to pursue the inverse condemnation action in order for the issue of taking

under the Fifth Amendment to be ripe for review by this Court. Gowan has failed to pursue an inverse condemnation action in North Dakota state courts, and thus his takings claim is not ripe for review.

It should be noted, the Ward County Commission specifically denies any taking of Gowan's property and specifically denies an inverse condemnation claim by Gowan would be meritorious. The above arguments are not intended in any way to waive legal defenses or questions of fact in a potential inverse condemnation action by Gowan.

V. There Are No Compelling Reasons For Granting Gowan's Writ Of Certiorari And Thus The Writ Of Certiorari Should Be Denied

Even if the Court disagrees with the Ward County Commission's arguments above, the Court should nevertheless deny Gowan's Petition for Writ of Certiorari because there are no compelling reasons for granting it, as required by Supreme Court Rule 10, which states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 10, quoted above, provides three reasons the Supreme Court may grant a Petition for Writ of Certiorari. *Id.* As indicated in the rule, the three listed reasons are not controlling and do not

fully measure the Supreme Court's discretion, but the three listed reasons do indicate the character of the reasons the Supreme Court considers when determining whether to grant a Petition for Writ of Certiorari. In light of the three listed reasons provided in Supreme Court Rule 10, it is clear the current case does not qualify as the type of case generally accepted by the Supreme Court for review on a writ of certiorari.

Subdivision (a) in Supreme Court Rule 10 does not apply because this case comes to the United States Supreme Court following a decision of the North Dakota Supreme Court, not a decision of a United States court of appeal.

Subdivision (b) in Supreme Court Rule 10 does not apply because in this case the North Dakota Supreme Court did not "decide[] an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. . . ." The North Dakota Supreme Court declined to address Gowan's federal due process and equal protection claims because they were deemed waived. With regard to the federal taking without just compensation claim, the North Dakota Supreme Court held Gowan must first pursue an inverse condemnation lawsuit in order to raise the issue. That ruling is not only consistent with North Dakota law and the law of other states and the United States courts of appeals, it is consistent with clear United States Supreme Court jurisprudence discussed in *Williamson County Regional Planning*

Com'n, quoted above. *Id.* at 473 U.S. at 173. The North Dakota Supreme Court decision in this case was in fact based on North Dakota state law which provides for very limited judicial review in cases brought pursuant to North Dakota Century Code section 28-34-01, and great deference is given to democratically elected local governing bodies. In that regard, the North Dakota Supreme Court has stated:

> [U]nless the Board acted arbitrarily, capriciously or unreasonably, or there is not substantial evidence to support the decision, it must be affirmed. A decision is not arbitrary, capricious or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation.

Klindt v. Pembina County Water Res. Board, 2005 ND 106, ¶ 12, 697 N.W.2d 339 (citing *Douville v. Pembina County Water Res. Dist.*, 2000 ND 124, ¶ 5, 612 N.W.2d 270 (quoting *Graber v. Logan County Water Res. Bd.*, 1999 ND 168, ¶ 7, 598 N.W.2d 846)). In any event, the issue of whether the Ward County Commission acted "arbitrarily, capriciously or unreasonably" was only ever presented to the state courts as an issue of state law and the United States Supreme Court does not have jurisdiction under 28 U.S.C. § 1257 to decide purely state law issues presented in North Dakota state courts.

Subdivision (c) in Supreme Court Rule 10 does not apply because in this case the North Dakota Supreme Court did not "decide[] an important question of federal law that has not been, but should be, settled by [the Supreme] Court . . . " and the North Dakota Supreme Court did not "decide[] an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court." Again, the North Dakota Supreme Court did not in fact decide any federal law question on substantive grounds, much less an important question. Further, the Ward County Commission has been unable to locate any federal or state case in which a court agreed with Gowan's novel position that he is entitled as a matter of constitutional right to have his property rezoned, effectively forcing the closure of an existing firing range used for law enforcement and military training. He has presented no explanation why this is an important question that should be addressed by the United States Supreme Court. In fact, if Gowan's position is correct, it would create an absurd result: that a person is entitled as a matter of constitutional right to have his property rezoned, effectively forcing a neighbor to stop preexisting activities, thereby depriving the neighbor of the right to use its own property consistent with current zoning. On a whim, a person could exercise his "right" to force his neighbor to stop preexisting and legal use of the neighbor's property. Gowan's position is absurd and does not present an important question for this Court to decide and thus the Petition for Writ of Certiorari should be denied. It is undisputed the subject firing

range was in existence and was used continuously for law enforcement training for decades before Gowan purchased his property in 2005. Further, Gowan's property is and has always been zoned agricultural, as is the other property surrounding the firing range. There is no evidence in the record Gowan cannot use his property for agricultural purposes, as is the other property surrounding the firing range.

VI. Objections To Jurisdiction And Gowan's Misstatements Of Fact And Law

For the reasons discussed above, pursuant to Supreme Court Rule 15(4), the Ward County Commission specifically objects to the jurisdiction of this Court to consider the issues presented by Gowan.

Further, pursuant to Supreme Court Rule 15(2), the Ward County Commission specifically objects to Gowan's statements of fact and law discussed above. In addition to the misstatements of fact and law discussed above, the Ward County Commission objects to Gowan's statement in the Argument section of the Petition for Writ of Certiorari that, "[t]he decision to deny him the right to develop his own land due to a safety hazard created by the government itself is unreasonable, arbitrary, and capricious." *Id.* at p. 14. As indicated above, Gowan's position in that regard was decided by the North Dakota Supreme Court under North Dakota State law, as it was presented by both parties to the court, and thus the United States

Supreme Court has no jurisdiction to review the issue.

The Ward County Commission also objects to Gowan's statement that, "[i]t is unreasonable that they are using the safety issue to disallow him to build when he has made clear he is willing to put a buffer between the shooting area with farm land and therefore the homes at issue would be literally out of the line of fire." *Id.* The uncontradicted evidence in the record establishes the Ward County Commission requested that Gowan meet with law enforcement and attempt to reach a solution to safety concerns but Gowan refused to confer with law enforcement in that regard. Also, safety was not the only reason for the denial of the rezoning request. The findings of the Ward County Commission explicitly provide other reasons for the denial of Gowan's request based on testimonial evidence, including that the rezoning would hamper rural activities, harm wildlife, and likely result in the closure of the law enforcement firing range, causing the government to incur substantial expenses to purchase new land and build a new firing range.

The Ward County Commission further objects to Gowan's statements that, "[i]t is unreasonable for the Commission to allow houses to be in closer proximity than the homes he intends to build, while denying him the right to build homes on his property", "[i]t is also unreasonable for the County to consider safety as an issue when they allow people to drive on the road", "[i]f it is unsafe for the residents that would be living

on Gowan's property, then it is also unsafe for the people driving by on [the] county road that is situated between the firing range and Gowan's property", and "[i]t is both unreasonable and arbitrary for the County Commission to allow others to build homes and be in homes closer to the range and not allow his building to continue." *Id.* at p. 14. The uncontradicted evidence in the record establishes the other homes in the area are not downrange from the firing range, which the Gowan property is, and thus the other homes are not in danger. Further, the home adjacent to the firing range is owned by a law enforcement officer who is charged with maintaining the firing range. Also, there is insufficient evidence in the record that those individuals driving on the road are in danger and whether individuals on a road are in danger does not provide a constitutional right for Gowan to have his property rezoned.

The Ward County Commission also objects to Gowan's statement that, "[i]t is also unreasonable for the County Commission to deny him the ability to use his property as he sees fit, including developing it by building twelve residences in that area." *Id.* Gowan cites no law in support of his position in that regard, and in fact his position is contrary to many decades of jurisprudence throughout the state and federal courts that local zoning commissions do have authority and wide discretion to control land use through zoning. Gowan's statement suggests the applicable law makes any zoning decisions that control land use to be invalid on constitutional principles, which is

contrary to all jurisprudence the Ward County Commission has been able to locate.

Further, the Ward County Commission objects to Gowan's statement that,

> [i]n our view, it is the people using and operating the rifle range that have to make sure it is safe for any residents, any passersby driving on the adjacent road, and anyone within the area. If the rifle range is causing a safety problem, then the users of that range – including the governmental entity that is denying the rezoning – should be the ones that have to resolve that problem and make the area safe. David Gowan should not be responsible for insuring that the rifle range is being run in a safe manner, and he certainly should not be denied the right to develop his property because of a safety issue created by the government itself by its unsafe use of the near-by property.

Id. at pp. 14-15. Gowan's statements are not supported by any law and for the reasons discussed above, would lead to an absurd result.

The Ward County Commission also objects to Gowan's statement that,

> [b]y the same token, any speculation as to having to move the rifle range to another location and any added tax consequences to the city of Minot and Ward County is unreasonable and inappropriate. If indeed the county or city Police Department has to

> move it because of safety reasons, David Gowan should not be denied his right to develop his property because of something the city will have to do if they are indeed running something that is unsafe.

Id. at p. 15. Again, Gowan's statement is unsupported by law and leads to an absurd result. Further, there is no speculation as to the firing range likely having to close and that there would be added tax consequences to the government in having to move the rifle range. Law enforcement testimony before the Ward County Commission explicitly indicated other North Dakota law enforcement firing ranges have been forced to close under similar circumstances when neighbors complained of noise and safety issues. Testimony established the subject firing range would likely be forced to close if Gowan created a 12 lot residential subdivision on his property downrange from the subject firing range. Further, testimony before the Ward County Commission established that building a new firing range would cost approximately $500,000 plus the substantial expense of purchasing new land. If the property ceases to be used for law enforcement purposes the land reverts to the family that donated the land, and the local government would not receive the proceeds of a sale of the existing firing range land.

CONCLUSION

For the foregoing reasons, the Ward County Commission requests the Court deny David Gowan's Petition for Writ of Certiorari.

Dated this 26th day of August, 2009.

Respectfully submitted,

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